No. 18796

In the United States Court of Appeals
for the Ninth Circuit

RAY BRUMFIELD and AL LAMOTTE,
Plaintiffs-Appellants,

vs.

TRUCK INSURANCE EXCHANGE,
Defendant-Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF IDAHO,
SOUTHERN DIVISION

APPELLANTS' BRIEF

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JURISDICTION

This is an appeal from an order entered the 15th day of May, 1963, by the Honorable Fred M. Taylor, United States District Judge, District of Idaho, Southern Division, granting the defendant's motion for summary judgment in the above entitled matter. (Tr. 84-86) On the

25th day of October, 1962, the appellants filed a complaint for declaratory judgment in the United States District Court for the District of Idaho, Southern Division. (Tr. 4) This appeal is taken from a summary judgment granted therein. (Tr. 84-86)

Jurisdiction of the District Court is based upon diversity of citizenship of the parties and that the amount involved, exclusive of interest and cost, exceeds $10,000.00. (Tr. 4)

The appellants are citizens and residents of the State of Idaho, domiciled at Council, Valley County, Idaho. The defendant-appellee is a foreign insurance company incorporated and doing business under the laws of the State of California and authorized to do business in the State of Idaho, and having one of its offices at Boise, Ada County, Idaho. (Tr. 4) Accordingly, the District Court had jurisdiction, 28 USCA 1332, and this court has jurisdiction to review such matters as those on appeal, 28 USCA 1291, Rule 73, Federal Rules of Civil Procedure.

STATEMENT OF CASE

Joseph Johnson, the owner of two trucks, contracted with the Boise Cascade Corporation for the hauling of logs from what is known as the "south burn" near Banks, Idaho, to the Boise Cascade Mill at Emmett, Idaho.

The appellant, Brumfield, was the owner of a loader and Al LaMotte was the operator of said loader. (Tr. 17 line 14) On December 27, 1961, Mr. Joseph Johnson backed his logging truck under the loader for the purpose of obtaining a load of logs. (Tr. 22 lines 4-16) After Mr. Johnson's truck was partially loaded, a log which was placed upon the load by Mr. LaMotte, flipped and struck Johnson on the leg, breaking his leg. (Tr. 55-56 lines 7-25 & 1-11) The loading operation was directed by Mr. Johnson when the accident occurred. (Tr. 62 lines 6-11) Johnson brought suit for damages against the operator and owner of the loader. Such action was filed in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Adams. (Tr. 4 lines 28-32) The appellants, Brumfield, owner of the truck and LaMotte, operator of the loader, brought this action for declaratory judgment in the United States District Court to determine the liability, if any, of appellee Johnson's insurer.

The policy of insurance contained the following:

> "3. (a) (3). With respect to the described automobile or a substitute automobile, any employee of the named insured, provided the actual use of the automobile is under the direction and control of the named insured and is in the course of his employment with the named insured." (Emphasis ours) (Tr. 77)

The policy further provides in Paragraph 3 (f), "Use

of the automobile includes the loading and unloading thereof." (Tr. 77)

It is the position of the appellants that LaMotte, operating the loader, under the direction of Johnson, appellee's insured, in loading Johnson's truck, was an "insured" under the policy and that appellee must therefore defend Johnson's State court action and respond to any judgment rendered for the plaintiff therein. The defendant, Truck Insurance Exchange, took the deposition of Al LaMotte, operator of the loader and said deposition has been filed herein. The defendant, Truck Insurance Exchange, moved for a summary judgment, which was granted on the 15th day of May, 1963. This appeal is taken therefrom.

QUESTION INVOLVED AND MANNER IN WHICH IT IS RAISED

The sole question presented on this appeal is whether or not LaMotte while operating the loader under the direction of Johnson became the employee of Johnson under the "loaned-servant doctrine" thus placing LaMotte within the "insured" portion of appellee's policy.

SPECIFICATION OF ERRORS

1. The court erred in sustaining appellee's motion for summary judgment.

2. The court erred in entering judgment and dismissing appellants' complaint.

3. The court erred concluding in its order, dated and entered May 15, 1963, "That the plaintiffs were not 'loaned servants' of Joseph Johnson (the named insured in defendant's policy) and, therefore, not insured by the terms of defendant's policy."

ARGUMENT

I

The court erred in concluding in its order dated and entered May 15, 1963, "That the plaintiffs were not 'loaned servants' of Joseph Johnson (the named insured in defendant's policy) and, therefore, not insured by the terms of defendant's policy."

To ascertain the amount of direction and control involved in this case, it is necessary to place the litigants in their proper prospective within the logging industry.

The Boise Cascade Corporation conducts the major percentage of the lumber business in southern Idaho. This corporation's activities actually produces fringe employment for the industry's labor force although such persons' names do not appear on the payroll of the corporation (Tr. 32) Messrs. Johnson and LaMotte and Brumfield fall within this fringe area.

Both Messrs. Johnson and Brumfield are comparatively small operators in the logging field. They load and haul Boise Cascade's logs on a board foot basis to the Emmett Mill. (Tr. 17-19) They own their own equipment and employ the necessary operators. In the instant case, Mr. Johnson was the owner and operator of his own truck. Neither Mr. Brumfield nor Mr. Johnson can survive in the industry without the cooperation of the other. Mr. Johnson cannot afford to own and operate a loader and Mr. Brumfield cannot afford to own and operate a fleet of trucks.

The loading operation requires the skill and technique of an experienced operator. (Tr. 20-22) The trucker, aware of the capabilities of his own machine, must direct and control the loader during this operation. The primary reason for the control and direction by the trucker lies in the fact that he alone is responsible for his load. (Tr. 45 lines 12-25) If he loses the load or injures a third party with it, he cannot look to the loader for contribution. The trucker's personal safety depends upon the placement of the load. During the loading operation he stands in the most advantageous position to direct the loading operation. It must be remembered that the loader's skill is in the operation of his machine, not in the placement of the logs. The trucker's commands are directed to the loader by means of hand signals indicating where to place each individual log.

Appellants maintain that during the logging operation, the loader is the temporary employee of the trucker. It is true that he cannot discharge him from the general employment. He can, however, discharge him from his temporary employment by ordering him to stop the loading operation. We are only concerned here with the direction and control over the employee, LaMotte, at the time of the injury.

The necessity of this direction and control by the trucker is amply emphasized in that Mr. Johnson's complaint is that LaMotte failed to follow his directions, thus causing the injury.

The following quotes are taken from Mr. LaMotte's deposition and we set them out for the court's convenience:

> "Q. Now up in this area where you were working December 27, were the logs of a uniform size or were there a lot of different size logs involved?
>
> A. Well, they varies, some small to larger logs." (Tr. 22 lines 4-8)
>
> Q. Now the driver will stand upon the cab or behind this bang board you speak of?
>
> A. Yes, over on the bang board.
>
> Q. That is on top of the cab of his truck?
>
> A. Yes.
>
> Q. And when you have placed the log in its loaded position he will climb down and release your tongs for you?"

"A. Yes, sometimes--now he will have me shove a log forward so he can step off this bang board on to the log and then we have what we call a cat walk, you put on two or three logs on the bunk and two or three in the middle and you have this bang board to climb down and out, just step down on the logs and out."
(Tr. 39-40 lines 20-25 and 1-9)

"Q. At any time in the course of this operation did you take orders from the truck driver?

A. Yes, when the logs come up over the truck they motioned to me where they wanted to put the logs, what position they wanted it.

Q. Would that be on any log?

A. Generally.

Q. Or just certain logs?

A. Just any log, wherever they wanted me to put it I put it in place.

Q. You would go along with the truck driver's preference where he wanted it?

A. Yes, wherever he wanted the log laid.

Q. Of course, you were the loader, wouldn't you know pretty well where the logs ought to be so you could give him a good load so it wouldn't shift?

A. I would have a pretty good idea but he had to haul the logs." (Tr. 44 lines 1-20)

"Q. Did he have an advantage point upon the cab that was better than the one you had to tell how the load was going on?

A. Yes.

Q. He could see better from up there than you could?

A. Yes." (Tr. 45 lines 3-9)

"Q. In the course of loading the trucks, how would he communicate his desires to you?

A. He generally just pointed where he wanted them--just over here or over there (indicating).

Q. Would this be the case of you fellows actually working along together and getting this thing loaded?

A. Yes.

Q. And not a case of somebody being the boss?

A. We just kinda worked together--of course, he was in charge of his load." (Tr. 45 lines 12-25)

"Q. Actually it was a case of you people working as a team?

A. Well, actually I tried to put them where he wanted them." (Tr. 46 lines 1-4)

"Q. On this bottom tier that you said held the stakes of the truck, if he wanted a particular log from the deck to fit in good could he point out some particular log that he wanted you to load?

A. Yes, he could.

Q. In other words, he then could decide what logs he wanted and where to put them on his load?

A. Yes." (Tr. 62 lines 11-19)

In the case of Snetcher and Pittman v. Talley, 168 Okl. 280, 32 P.2d 883, (1934) the Supreme Court of Oklahoma faced the question as to whether or not the direction and control alone was sufficient under the "loaned-servant doctrine." S and P maintained a boiler repair shop. They contracted with Oklahoma Boiler Works for the use of an air hammer and a riveter.

Oklahoma Boiler Works sent the claimant who was paid by them and hired by them to operate the riveter. S and P. through their foreman directed the claimant when to start and stop the machine and generally supervised the method in which the work was done. The claimant received an injury while engaged in the work for S and P. The court at page 884 states:

> "S and P placed much importance upon the fact that Oklahoma Boiler Works hired and paid claimant, and urged this argument in contending that claimant was the employee of the Oklahoma Boiler Works and not the employee of S and P.
>
> "In this connection, in Arnett v. Hayes Wheel Company, 201 Michigan 67, 166 NW 957, 960, the facts were similar to the facts in the instant case, and the Supreme Court of Michigan in discussing whether or not the relation of master and servant existed said:
>
> 'But it is argued that Arnett was the servant of the Jackson Company because employed and paid by it. Ordinarily these are strong factors in determining the question but they are not controlling where it is shown that the employee was actually under the control of another person during the progress of the work. (Citing cases) ' "

Continuing the court stated on page 884 and 885:

> "The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master, or becomes subject to that of the person to whom he is later hired."

In Crutchfield v. Melton, 270 P.2d 642, the Supreme

Court of Oklahoma states the applicable rules under the "loaned-servant doctrine" at page 645:

> "It is well settled that one who is the general servant of another may be loaned or hired by his master to another for some special service so as to become, as to that service, the servant of such third person.
>
> "Servant lent by master to another for particular employment, although remaining general servant of master, must be delt with as servant of one to whom he is lent, as regards anything done in the latter's employment.
>
> "In determining whether general master of servant or person to whom servant was lent is liable for servant's acts, neither payment of wages nor power to hire and discharge is controlling."

The court continues:

> "The question to be answered in making a determination is in the act which the servant was performing at the time. Was he in the business of and subject to the direction of the temporary employer as to the details of such act?"

In Pinson v. Minidoka Highway District, 61 Idaho 731, 106 P. 2d 1020 (1940), Pinson was hired by the Reclamation Service and paid by the United States Government and directed by them to work under the orders of the Highway Engineer. The Highway District took the position that Pinson was not an employee of the Highway District; the Idaho court states at page 1022, quoting Standard Oil Company v. Anderson, 212 US 215, 29 S. Ct. 252, 53 L. Ed., 480, the rule by which to determine

whether a person is an employee is stated as follows:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If the other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become prohavice the servants of him to whom they are furnished."

To determine whether a given case falls within the one class or the other we must inquire for whom is the work being performed--the question which is usually answered by ascertaining who has the power to control and direct the servant in the performance of his work. At page 1022 of 106 P. 2d the court said:

> "The general test is the right to control and direct the activities of the employee or the power to control the details of the work to be performed and to determine how it should be done and whether it shall stop or continue that gives rise to the relationship of employer and employee, and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer and liable for compensation."
> (Citing authorities)

Counsel for defendant-appellee, in the trial Court cited the case of Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 P. 2d 400, for the proposition that "the decisive and ultimate factor is whether the allegedly loaned employee can be replaced

or discharged at the will of the temporary employer." We do not agree that such was the decisive point in the Nissula case.

The facts in the Nissula case were that Nissula owned a D-7 Caterpillar Tractor which he volunteered with his brother as operator for use on Southern Idaho Timber Protective Association lands for fighting a forest fire. The operator of the tractor was in the employ of the plaintiff and while the cat and operator were used on the fire, the plaintiff was paid by the defendant a fixed rate per hour which included use of the tractor and operator. The defendant's foreman, one Monte Cross, directed the operator to take the tractor up the side of a mountain to dig a trench as a fire break, but on objection of plaintiff that the terrain was too rough and rocky to safely operate the tractor, the defendant's fire warden ordered the tractor brought down and it was put to work skinning logs off the road near the campground. Shortly thereafter, the foreman Cross again ordered the tractor up on the hillside a short distance from where it had originally been. It became lodged against a stump and because the hill was so steep and rough the tractor could not be moved, and it was greatly damaged by fire.

The plaintiff brought suit for damages to the tractor and for loss of use of the tractor during the period it was under repair. The trial court granted a non-suit on

the ground that the operator of the tractor was employed by the plaintiff and that the damage was caused by the operator's own negligence. The Supreme Court reversed the decision and granted a new trial; the court stated at page 43:

> "The operator had been directed to take orders from Cross, and there is evidence that in going up on the hillside the second time and in pushing brush and dirt at the point where the tractor became stalled, he acted upon specific directions from Cross. As to such acts he was under the control of, and was as to such acts the servant of, the defendant, although at the same time he was the servant of the owner in the manipulation of the machine itself. 1 Restatement of Agency, Sec. 227. So if, under the circumstances, it was negligent to direct the operator to take the tractor up on the hillside and to push brush and dirt in the manner done, and the damage proximately resulted therefrom, then the defendant would be liable. These were questions of fact for the jury."

The court did not hold that the status of "loaned employee" could not be established where there was not complete control of the operation by the named insured, but simply that because the plaintiff supplied the operator for the tractor, plaintiff could not base his claim for damages on negligence of the operator. The court specifically held that even though the operator of the tractor was the employee and agent of the plaintiff, nevertheless, as to the specific operation under way at the time the tractor was damaged, there was sufficient

evidence to go to the jury on the question of whether or not the operator of the tractor at that time was the loaned employee and under the direction of the defendant.

The Nissula case, therefore, supports our contention herein that although LaMotte was hired by, under the general direction of, and paid his compensation by Brumfield, the allegations of Johnson's complaint in the State court that the cause of the injury to Johnson was negligent acts done and performed by LaMotte in loading the Johnson truck, places LaMotte under the coverage of the loading and unloading clause of defendant-appellee's policy. As to the entire operation of placing the logs on the Johnson truck, LaMotte was a loaned employee of Johnson.

In the case of Cloughley v. Orange Transportation Company, 80 Idaho 226, 327 P.2d 369, the plaintiff Cloughley was employed by Detweiler, Inc., on a construction job at the A.E.C. Reactor Station. Detweiler, Inc., was consignee of two boilers shipped f.o.b. job site by Consolidated Freightways to Idaho Falls and then by way of the defendant Orange Transportation Company to the job site. The defendant Park operated the Orange truck-tractor in making the delivery.

Detweiler's foreman, a Mr. Pearcy, advised Park that he, Pearcy, had arranged for a crane to unload the boilers. When the crane arrived, Pearcy told plaintiff

to go on top the boilers to fasten the cables for the unloading operation and then to remain on top of the boiler or on top of the truck to watch the operation. It was arranged between Park and Pearcy that Park would operate the truck during the unloading, the plan being to raise the boilers by means of the crane, then drive the truck from under the boiler and lower it to the ground. Park was told to watch for signals from Pearcy as to when to move the truck forward and when to stop. When the boiler was raised, it became wedged in the trailer and as the truck moved five to twelve feet forward, it flexed the boom of the crane and under this stress the boom collapsed and fell across the top of the boiler. Plaintiff then jumped from the top of the trailer to the ground to avoid being struck by the falling boom. He brought this action to recover damages for injuries allegedly suffered as a result of the jump. Plaintiff alleges negligence on the part of Park, acting as agent and servant of Orange Transportation Company, in failing to halt the forward motion of the truck upon signal of Pearcy.

Defendants contended that while driving the truck to assist in the unloading, Park was a loaned servant and employee of Detweiler, Inc., and that Workmen's Compensation is plaintiff's sole and exclusive remedy. The trial resulted in a verdict and judgment in favor of plaintiff and defendants appealed. The Supreme Court

reversed the judgment and ordered the case dismissed, holding that plaintiff was a loaned employee and therefore that Workmen's Compensation was his only remedy.

The court stated at page 234:

> "It is clear from the evidence that it was the duty of Detweiler, Inc., the consignee, to unload the boilers and that Detweiler, Inc., recognized that duty and actually took charge of and performed the unloading operations. From this it follows that Park, in operating the truck during the attempted unloading on September 2, was the temporary loaned employee of Detweiler, Inc. Therefore, Park was a co-employee or fellow servant of plaintiff. Neither Park nor his general employer, Orange Transportation Company, were third parties against whom plaintiff could maintain a tort action for damages under Section 72-204, Idaho Code. * * *
>
> "In Pinson v. Minidoka Highway District, 61 Idaho 731, 106 P.2d 1020, the rule for determining who at the particular time is the employer, was stated as follows:
>
> 'The general test is the right to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue that gives rise to the relationship of employer and employee, and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer, and liable for compensation.' "

The court in the Orange Transportation case then went on to quote from the Pinson case to the effect that it is well established that the rule to the effect that the

question of the identity of the person who pays compensation is not controlling and is a circumstance which is decisive or determinative of the question whether a person to whom an employee is lent becomes his employer.

In Brown v. Arrington Construction Company, et al., 74 Idaho 338, 262 P.2d 789, defendant Arrington Construction Company was employed on an oral contract by Bonneville County to construct a bridge across a canal and also to remove debris consisting of the old bridge and bridge abuttments with a drag line. The defendant, Skinner, an employee of defendant Arrington Construction Company, operated the drag line.

During the course of the work in removing the debris, the County sent the plaintiff Brown to the job site with a road grader to make a detour for traffic to go around the place where the drag line was operating. While driving the grader past the drag line, the boom on the drag line came in contact with electrical power lines and apparently the grader somehow touched the drag line, causing Brown to be knocked unconscious and severely burned by the electric current.

The defendant Arrington Construction Company contended that its driver, Skinner, was a "loaned employee" of the County in the removal of the debris and for that part of the work the drag line and its operator were

loaned on a hourly basis to the County.

The court held that the evidence presented a jury question as to whether Skinner was under the direction of the defendant Arrington Construction Company or in fact under the direction and control of the County at the time of the accident and further pointed out that "there was a conflict in the evidence as to whether such work was done as an extra item in connection with the verbal contract for the building of the new bridge."

It is interesting to note that the court in the **Brown** opinion quoted **Nissula v. Southern Idaho Timber Protective Association**, 73 Idaho 37 at page 342:

> "We recognize that such operator remained the servant of the owner of the tractor as to his acts in handling and operating the machine but was the servant of the defendant in placing the machine in a hazardous position to its damage upon the order of defendant. And we further said that as to the operator's acts in manipulating the machine, his relationship as servant of the general employer was not altered by the fact that he was subject to the control of the defendant as to where to go and what work to do. The quotation in such case from **1 Restatement of Law of Agency**, Sec. 227, seems particularly appropriate to the case at bar and is as follows:
>
> " 'A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other servant as to some acts and not as to others.' "

As clearly pointed out in the Nissula case, the mere fact that the driver or operator of the tractor (or in this case the loader) was under the general direction and control of the owner of the machine does not prevent the operator from being, on certain occasions, a loaned employee of another. The determinative factual question is as to who has direct supervision and control was the particular operation which caused the injury. In the Nissula case, although the plaintiff's brother had for some time been employed by plaintiff as operator of the tractor and the operator and tractor were together loaned to the defendant and even while employed on the fire job for the defendant the plaintiff had some direction and control over the place where and the manner in which the tractor was to be used, nevertheless, the Supreme Court held that the fact that direction for use of the tractor at the time it was placed in the position of peril and was burned by the fire was under the direction of the defendant and that defendant could be, in those situations, the employer for the purpose of determining liability for negligent acts.

Likewise, in the Orange Transportation case, although the defendant Orange Transportation Company was the general overall employee of the truck driver, nevertheless, supervision of the loading operation was assumed by the Detweiler Company, which was also the employer of the plaintiff, and therefore the court held there was

a fellow-servant relationship between plaintiff and the person causing the damage because such person at the time of the accident was under the direction and specific control of Detweiler's employee.

We submit that under the rule of the Idaho Supreme Court cases, LaMotte, operator of the loader, in loading the logs on the Johnson truck, was a "loaned employee" of Johnson and under the defendant-appellee, Truck Insurance Exchange's policy was a named insured. The defendant-appellee Truck Insurance Exchange must, therefore, assume its responsibility to defend the suit brought by Johnson against Brumfield and LaMotte and to stand ready to pay any damages awarded as such insurer.

Dated this 1 day of November, 1963.

Respectfully submitted,

ELAM, BURKE, JEPPESEN
& EVANS

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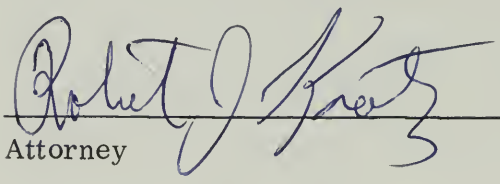
Service of the foregoing Brief of Appellants is hereby accepted by receipt of a copy thereof this _____day of_____, 1963.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Attorney